BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN M. WEAR	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,029,395
FOUR POINTS BY SHERATON WICHITA AIRPORT	)	& 1,029,396
Respondent	)	
AND	)	
	)	
KANSAS RESTAURANT & HOSPITALITY	)	
ASSOCIATION SELF-INSURED FUND (KRHASIF)	)	
Insurance Carrier	)	

ORDER

Respondent appeals the August 28, 2008, Award of Administrative Law Judge John D. Clark (ALJ) in Docket No. 1,029,395.[1] Claimant was awarded benefits for a 17.5 percent whole body functional impairment, followed by an 85.25 percent permanent partial general (work) disability based on a 70.5 percent task loss and a 100 percent wage loss for injuries suffered from an injury on August 29, 2005.

Claimant appeared by his attorney, E. L. Lee Kinch of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Jeffery R. Brewer of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. Additionally, at the oral argument to the Board, the parties stipulated that the ALJ's finding of a 17.5 percent whole body functional impairment is not disputed. The parties further stipulated that the finding by the ALJ that claimant had suffered a 70.5 percent task loss under K.S.A. 44-510e is not disputed, and that figure may be used in calculating any work disability claimant may be entitled to in this award. The parties also stipulated that the ALJ's calculation of temporary total disability compensation (TTD) and temporary partial disability compensation (TPD) and the amounts utilized in

[1] The Award was for both Docket No. 1,029,395 and Docket No. 1,029,396.

the calculation of this award are proper and may be utilized in calculating this award. Finally, the 2 percent right lower extremity award in Docket No. 1,029,396 for the March 14, 2006, injury to claimant's right knee is not disputed. The Board heard oral argument on November 21, 2008.

ISSUES

What is the nature and extent of claimant's disability? As the parties have stipulated to a 17.5 percent whole body functional impairment and a 70.5 percent task loss, the only issues remaining for the Board to decide are claimant's wage loss under K.S.A. 44-510e and whether claimant should be denied a work disability due to his alleged lack of good faith in attempting to retain his job with respondent or have a wage imputed for lack of a good faith job search. Respondent argues that claimant's poor conduct led to his termination from an accommodated job and claimant should be limited to his functional impairment. Claimant argues that his termination stems more from respondent's bankruptcy situation and the overreaction of Scott Ragatz, respondent's newly appointed general manager, rather than from any action or inaction on claimant's part.

FINDINGS OF FACT

Claimant first started working for respondent as a maintenance engineer in June 2003. After a time, claimant was promoted to lead engineer, but not long after, he was laid off. Claimant was rehired on May 28, 2005. On August 29, 2005, while unloading ceiling tiles from an elevated position, claimant started to slip as he was pulling the tiles out of a van. Claimant twisted his body in order to catch the tiles so that they would not be damaged and he felt a pop in his low back, and a burning sensation in his back and down his left leg. The tiles weighed 45 to 50 pounds.

Claimant reported the injury to then general manager Kent Mix and was referred to Pat Watts, respondent's workers compensation associate, and to HMA MedWorks on August 30, 2005. Claimant was again examined by HMA MedWorks on September 2 and 7, 2005, and provided physical therapy and medication. He was returned to work with restrictions. On September 14, 2005, claimant was referred to Robert Eyster, M.D., for an orthopedic evaluation. An MRI was performed and two epidural steroid injections were administered. The first injection helped for a few months, but the second provided no benefit. Claimant continued to work under restrictions during this time.

While claimant was working under restrictions, he stepped on a ballpoint pen and injured his right knee on March 14, 2006. This injury was litigated in Docket No. 1,029,396 and is not disputed. However, after this incident with the ballpoint pen, claimant was

assigned a job at a desk. Also, the injury to the knee aggravated claimant's low back and he was referred back to HMA MedWorks. Claimant underwent knee surgery and returned to work April 18, 2006, with restrictions.

Respondent hotel was one of three involved in a bankruptcy proceeding. Scott Ragatz, the managing director and general manager of the three hotels, was appointed by the bankruptcy court on March 10, 2006, to manage and run the hotels and help resolve the bankruptcy situation. Mr. Ragatz's expertise is in working with "stressed" hotels. He has, on occasion, had to terminate employees with little or no warning. This is part of his duties, along with the day-to-day operation of the hotels.

Mr. Ragatz first met claimant when he became aware that claimant had a workers compensation injury. He was advised that claimant needed a light-duty position with respondent. He described a meeting with claimant where claimant was sitting in the office "really not doing much of anything".[2] He asked claimant what he was doing, and claimant replied that he was contemplating his next move. Mr. Ragatz determined that claimant did not seem to have any sense of urgency. He had one other meeting with claimant before terminating claimant on April 24, 2006. Claimant was terminated for his inaction. The Employee Warning Notice[3] lists several reasons for the termination, including claimant's failure to provide estimates for work to be done on the rooftop AC units, damage done to doors left outside and not mounted, a lack of leadership, a maintenance area which is unorganized and landscaping in disarray. The question on the form asking whether the "team member" had been warned previously was left unanswered. Mr. Ragatz acknowledged that claimant was given no written warning before this termination. Claimant was terminated along with several other employees.

A work "Performance Appraisal" conducted on claimant on June 14, 2004,[4] graded claimant in several areas. Claimant was ranked at good to very good in all areas, including professional manner, quality of work, reliability, productivity and job knowledge. Also, effective February 26, 2006, claimant received a raise in salary from $22,000.00 to $25,000.00 per year. The parties filed a stipulation with the Division of Workers Compensation on August 8, 2008, stating that claimant filed a complaint with the Kansas Human Rights Commission alleging employment discrimination based on a physical handicap. The parties stipulated that claimant entered into a settlement with respondent, with claimant being paid consideration and respondent being given a release of liability. The terms of that settlement are not contained in this record.

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[2] Ragatz Depo. at 12-13.

[3] Ragatz Depo., Ex. 1.

[4] Ragatz Depo., Ex. 5.

Claimant has a history of back problems, including lumbar disc surgery at L5-S1 in November of 2004. Claimant has been examined and treated by several health care professionals during this litigation. An MRI scan of the lumbar spine on September 8, 2005, indicated mild disk desiccation at L4-5 and L5-S1. An MRI on May 18, 2006, indicated mild disk desiccation at L3-4 and a broad based disk bulge at L4-5.

Claimant was referred to board certified neurological surgeon Paul S. Stein, M.D., for an examination at claimant's attorney's request on September 20, 2006. Claimant was diagnosed with the preexisting left S1 radiculopathy and post surgery, which was aggravated by the August 29, 2005, and March 14, 2006, incidents. Claimant had degenerative disk disease with protrusions at L4-5 and L5-S1. Dr. Stein, at some point, became claimant's treating physician. Claimant was again examined on December 21, 2006. At that time, claimant was recommended for a referral for additional back surgery. Claimant was sent to Camden Whitaker, M.D., and underwent a discectomy and fusion at L4-5 and L5-S1. Claimant was ultimately released with a 15 percent whole person impairment related to the August 2005 work injury. This rating, calculated pursuant to the fourth edition of the AMA *Guides*,[5] included a reduction due to the prior surgery. Dr. Stein was provided a task list compiled by vocational expert Doug Lindahl, containing 34 tasks of which claimant was no longer able to perform 25, for a 74 percent task loss. Claimant was advised to avoid lifting more than 30 pounds very occasionally, 20 pounds occasionally but not repetitively and 10 pounds frequently. He was to avoid repetitive lifting from below knuckle height or above chest height and avoid repetitive bending and twisting of the low back. Alternate sitting, standing and walking was recommended as needed.

Claimant was referred by respondent to board certified family practitioner David. W. Hufford, M.D., for an evaluation on June 5, 2008. Dr. Hufford's diagnosis agreed with that of Dr. Stein. Dr. Hufford rated claimant at 20 percent to the whole person for the lumbar injuries and resulting surgeries. In reviewing the task list of Doug Lindahl, Dr. Hufford found claimant unable to perform 24 of 34, for a 71 percent task loss. Claimant was restricted from lifting over 10 pounds frequently and 20 pounds occasionally, with no lifting greater than 30 pounds. He recommended claimant only occasionally bend, stoop and lift.

Claimant began looking for work on July 24, 2006, after he was found to be at maximum medical improvement (MMI) by Dr. Librodo. Claimant made 17 applications in August and ultimately found part-time work as a cook for the VFW Post 112, working three days per week and being paid $45.00 per shift. Claimant continued working until December 7, 2006, at which time Dr. Stein recommended claimant be taken off work. Claimant was referred for back surgery and underwent an anterior lumbar interbody fusion at L4-5 and L5-S1 under the hand of Dr. Whitaker. Claimant was released at MMI on May 14, 2007, and began looking for work again. He again secured employment with the

[5] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

VFW on September 2, 2007, which lasted until about one month before the regular hearing. Claimant continued searching for work as of the regular hearing in May 28, 2008. From September through November 2006, claimant applied for 36 job positions. After returning to the job search after surgery, claimant applied for 39 positions during June, July and August 2007. Claimant's job search record[6] lists the many job contacts attempted by claimant. During the time claimant was released to work, he averaged several job search contacts per week.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[7]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[8]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[9]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

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[6] R.H. Trans., Cl. Ex. 4.

[7] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[8] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[9] K.S.A. 2005 Supp. 44-501(a).

> injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[10]
>
> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[11]

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[12] and *Copeland.*[13] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[14]

The parties have stipulated to the functional impairment and task loss percentages to be used in this award. The only issues remaining for Board determination involve whether claimant put forth a good faith effort to retain his employment or obtain employment after his termination from respondent and whether the termination itself constituted a failure on claimant's part to retain his employment with respondent.

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[10] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[11] K.S.A. 44-510e.

[12] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[13] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[14] *Id.* at 320.

Respondent argues that the termination was due to actions on claimant's part which constituted a less than good faith effort by claimant. But the record does not support respondent's position. Claimant had been evaluated as good to very good in his previous evaluations, and only two months before the termination was granted a pay raise. The termination, rather than being the fault of claimant's lack of effort, appears to be the result of a respondent in financial difficulties who brought in what appears to be a hatchet man to help reduce operating expenses. As noted above, Mr. Ragatz's job was to reduce costs and he regularly did so by letting employees go. Claimant appears to have been the victim of cost reducing labor reductions. The Board finds it significant that claimant was given no warning or time to cure any perceived deficiencies before the termination.

Termination for cause does not always result in a denial of work disability. The test is good faith on the part of both the employer and the employee.[15]

The Board finds that claimant's actions leading up to the termination do not constitute a failure by claimant to put forth a good faith effort to retain his employment. Additionally, claimant exhibited a good faith search for jobs, after being released at MMI, on more than one occasion. This job search, involving several job contacts per week, continued up to the time of the regular hearing. Claimant requests that the award of the ALJ granting claimant an 85.25 percent work disability be affirmed, and the Board agrees. Claimant's actions leading up to the termination and after constituted good faith pursuant to K.S.A. 44-510e.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated August 28, 2008, should be, and is hereby, affirmed.

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[15] *See Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

IT IS SO ORDERED.

Dated this ____ day of January, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: E. L. Lee Kinch, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge